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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GEORGE ALLEN ANDERSON, Defendant and Appellant.	E069057 (Super.Ct.No. RIF1600173) OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge. Affirmed in part, reversed in part, and remanded with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Steve Oetting, Daniel

J. Hilton, and Matthew C. Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

According to the prosecution's evidence, when defendant George Allen Anderson was 39, he told his 16-year-old great-niece that he loved her and he was going to marry her. In chat messages, he called her "love," "honey," and "my lady" and said he was "crazy for [her]." She called him "my husband"; he responded with a heart emoticon. On four occasions, they engaged in consensual sex acts, including intercourse and digital penetration.

Defendant testified that he loved his great-niece only as a relative, and he denied any sexual activity with her.

A jury found defendant guilty on count 1, statutory rape of a minor more than three years younger than the perpetrator (Pen. Code, § 261.5, subd. (c)), and on count 2, sexual penetration of a minor (Pen. Code, § 289, subd. (h)). He was sentenced to a total of two years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

In this appeal, defendant contends that the trial court erred by giving CALCRIM No. 1191A, which told the jury that the prosecution had presented evidence of an uncharged act of sexual penetration of the victim, and that it could use this uncharged act as propensity evidence to prove either count, as long as it was proven by a preponderance of the evidence. He argues that:

1. Because the evidence of the charged sexual offenses and any uncharged sexual offense all came from the same victim and was not otherwise corroborated, the instruction erroneously told the jury that the victim could corroborate herself.

2. There were no *uncharged* acts of sexual penetration — the evidence showed two acts of sexual penetration, and the jury was allowed to find defendant guilty of sexual penetration of a minor based on either one. Thus, this instruction effectively allowed the jury to use a *charged* offense as propensity evidence, even if it was not proven beyond a reasonable doubt, in violation of *People v. Cruz* (2016) 2 Cal.App.5th 1178.

We disagree with defendant's first argument. We do agree with his second argument; we will conclude, however, that the error affects only count 2. Accordingly, we will affirm the conviction on count 1 and reverse the conviction on count 2.

I

FACTUAL BACKGROUND

A. *The Prosecution Case*.

In August and September 2015, Jane Doe[1] was 16. Defendant was 39. He was Doe's great-uncle (the half-brother of her maternal grandfather).

In August 2015, Doe and her immediate family went to Hawaii for the funeral of the maternal grandfather; so did defendant. Doe's family returned home later in August.

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[1] Doe's real name has been redacted from the record and replaced with this fictitious name. However, we have not found any court order authorizing this. (See Code Civ. Proc., § 293.5.)

Around the time of the funeral, defendant told Doe that he loved her. She began having "feelings" for him. She thought of him "in a boyfriend way." He made her believe they were going to get married. When no one could see them, they kissed and held hands. They also messaged each other via Skype chat and text.

In chat messages, Doe called defendant, "my love." He called her "love," "honey," and "my lady." He said he loved her. He also said, "Ah-hah, crazy for you," with a smiley-face emoticon. Once, Doe called defendant, "my husband"; he responded with a heart emoticon. In another exchange, they said:

Doe: "Love you, cousin."

Defendant: "Why[,] you miss me?"

Doe: "[I] miss [you] so much."

Defendant: "I [heart emoticon] you very much," followed by a smiley-face emoticon.

Also around the time of the funeral, defendant occasionally visited Doe's family and spent the night at their home in Riverside. When defendant visited, he slept in the same bedroom as Doe and her younger brother. Doe's brother had cerebral palsy and was largely unable to communicate. Because of his disability, the bedroom door was always left open.

There was a bunk bed with three levels: an upper ("top") bed, a lower ("middle") bed, and a trundle ("bottom") bed.

According to Doe's mother, and according to defendant as well, Doe slept in the top bed; Doe's brother slept in the middle bed; and when defendant visited, he slept in the bottom bed.

In talking to the police, Doe confirmed that she slept in the top bed while defendant slept in the bottom bed. At trial, however, she testified that defendant and her brother both slept in the middle bed and she slept in the bottom bed.

Doe testified that defendant slept over four times, and each time he engaged in sexual activity with her in her bedroom.

The first time he slept over, he sat next to Doe on the middle bed, grabbed her hand, and made her touch his penis. It was hard. He said, "This is how I feel." But, he added, "he didn't want to take [her] virginity." Later that night, while in the bottom bed, defendant and Doe kissed, and he touched her breasts and hips.

While Doe and defendant were in the middle bed, her mother came in, turned on the light, and checked on her brother, who was in the bottom bed. Doe did not think her mother saw her, however, because she was lying behind defendant.[2]

Once, in the middle bed, defendant pulled down Doe's pants and put his fingers in her vagina.

Once, in the bottom bed, defendant lay on top of Doe and rubbed his penis between her legs.

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[2] Doe testified that her mother similarly came in one other time when she was in bed with defendant.

Once, after rubbing his penis on Doe, defendant ejaculated on her.

And once, in the bottom bed, when defendant was doing "the same thing," he put his penis "in but not all the way in" Doe's vagina. It was there for less than 30 seconds. He then ejaculated into her pants. Afterwards, he was "worried and scared" because "[he] almost took [her] virginity."

Doe had told police that, on two occasions, she lifted her brother into the top bed so she and defendant could be in the bottom bed. At trial, she denied doing this. She admitted that her brother's weight was such that it would be difficult to lift him into the top bed.

For some reason, defendant started to think that Doe's mother had found out about their relationship. He took Doe to a hotel so they could be together one last time and so he could "love [her] up." They undressed and lay on the bed. He kissed her, kissed and touched her breasts, and put his fingers in her vagina. He was about to put his penis in her vagina but stopped, saying "he didn't want [her] to lose her virginity." Before trial, Doe had never told anyone, including the police, about this incident in the hotel.

On September 11, 2015, Doe's parents took the family's cell phones in for an upgrade. In the process, they found text messages from defendant on Doe's phone. Doe's father sent the text messages to his email; however, he was never able to open the email. At trial, he remembered one text message as saying something about a dream and about Doe having defendant's baby.

Doe's mother confronted Doe, who acknowledged the sexual relationship. The family immediately contacted the police.

In cooperation with the police, Doe's mother made two pretext calls to defendant.

In the first call, Doe's mother said there was "a lot of stuff that's been going on"; defendant replied, "[M]y heart is broken." She pointed out that he was much older than Doe, then asked "[W]hat were you thinking? . . . [W]hat if . . . she's pregnant . . . ? I mean, you know the hurt that . . . you've done?" He replied, "I didn't hurt her." He then said he could not hear Doe's mother, and the call ended.

In the second call, Doe's mother asked, "[D]id you even use a condom . . . ? . . . I know you had sex with my daughter. Did you have sex with her?" Again, he replied, "I didn't hurt [her]." And once again, he said he could not hear Doe's mother, and the call ended.

Doe's mother testified that, one morning, she went to Doe's bedroom and found the door closed. She went in and saw both Doe and defendant lying in the middle bed. Defendant immediately "jumped up" into a sitting position. However, she had never told the police about this.

Doe's mother also testified that defendant once did Doe's laundry, which she thought was odd.

B. *The Defense Case*.

Defendant took the stand and denied any "sexual interaction" with Doe.

He testified that he and Doe's mother had been estranged since an argument in 2007. They got in touch again due to the maternal grandfather's death, but they were "s[t]ill at odds."

He slept over at Doe's house only twice after the funeral. He remembered Doe's mother coming into the bedroom each time; however, the door was open, he was not in bed with Doe, and he did not "jump[] up."

In the chat messages, he called Doe "honey" and "my lady" and said he was "crazy" for her because he loved her as a relative; he said the same things to his wife and daughter.

He denied sending Doe a text saying that he wanted to have a baby with her. However, he did send her a text saying that he had had a dream about her holding *a* baby (rather than *his* baby).[3]

Defendant admitted that Doe told the truth about everything other than that he had had sex with her.

Defendant was deaf; he wore hearing aids. He testified that, during the pretext calls, due to feedback from his hearing aids as well as a poor phone connection, he "could barely make out what [Doe's mother] was saying." He told her his heart was broken because he thought they were discussing his brother's death. He did not hear her

[3] At one point, he admitted it was his baby. Later, however, he corrected this.

question about a condom. However, he admitted that he knew she was accusing him of having sex with Doe.

II

JURY INSTRUCTION REGARDING UNCHARGED SEXUAL PENETRATION

Defendant contends that CALCRIM No. 1191A, concerning the jury's consideration of an uncharged act of sexual penetration, was erroneous in several respects.

A. *Additional Factual and Procedural Background*.

Count 2, charging sexual penetration of a minor, was originally based on the one instance in Doe's bedroom. While Doe was on the stand, however, the prosecutor asked her, "Are there any other things that happened that we haven't talked about between you and your uncle physically?" In response, Doe testified to the hotel room incident, which involved a second instance of sexual penetration. She admitted that she had never told the police about the hotel incident, and she agreed that "this is the first time any of us are hearing about it . . . ."

CALCRIM No. 1191A, as given in this case, stated:

"The People presented evidence that the defendant committed the crime of sexual penetration of [Doe] that was not charged in this case. This crime is defined for you in these instructions.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged

offense. Proof by [a] preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that [it] is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide the defendant committed the uncharged offense, you may, but are not required[] to[,] conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude that the defendant was likely to commit sexual intercourse with a person under age 18 who is more than three years younger than the defendant, and sexual penetration of a person under 18 with a foreign object as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of sexual intercourse with a person under age 18 who is more than three years younger than the defendant and sexual penetration of a person under 18 with a foreign object. The People must still prove each charge beyond a reasonable doubt.

"Do not consider this evidence for any other purpose."

The jury was also given the following unanimity instruction:

"The defendant is charged with sexual intercourse with [Doe] and sexual penetration of [Doe] as alleged in Counts 1 and 2 sometime during the period of August 17th through September 11th, 2015.

"The People presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless:

"One, you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense . . . . Or, . . . two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged." (CALCRIM No. 3501.)

In closing argument, consistent with the unanimity instruction, the prosecutor stated that a guilty verdict on count 2 could be based on either sexual penetration in Doe's bedroom or sexual penetration in the hotel room.

B. *Allowing Doe to Corroborate Herself.*

First, defendant contends that CALCRIM No. 1191A was erroneous under the circumstances of this case, because it effectively allowed Doe to corroborate herself.

Doe was the only witness who testified to the sexual offenses that took place in her bedroom. Moreover, Doe was the only witness who testified to the sexual offense that took place in the hotel room. There was no physical evidence. Defendant therefore argues that allowing the jury to use Doe's testimony about the sexual offense in the hotel room to prove that he had a propensity to commit the sexual offenses in the bedroom — and thus to corroborate Doe's testimony that the sexual offenses in the bedroom did, in fact, occur — is irrational bootstrapping.

People v. Gonzales (2017) 16 Cal.App.5th 494 rejected an identical argument. It acknowledged that the argument was supported by older Supreme Court cases, namely *People v. Stanley* (1967) 67 Cal.2d 812 and *People v. Scott* (1978) 21 Cal.3d 284. (*Gonzales, supra,* at p. 501.) However, it went on to say: "Both *Stanley* and *Scott* were decided prior to the enactment of Evidence Code section 1108, subdivision (a). [Citation.] Prior to the enactment of section 1108, evidence of the defendant's disposition to commit a sex offense was generally excluded. [Citation.] After the enactment of section 1108, courts can no longer exclude such evidence as prejudicial per se, but must engage in a weighing process under section 352. [Citation.]

"Nothing in section 1108 limits its effect to the testimony of third parties. Instead, the statute allows the admission of evidence of uncharged sexual offenses from any witness subject to section 352. [Citation.] Here the trial court complied with the statute. CALCRIM No. 1191 is an appropriate instruction.

"Gonzales claims CALCRIM No. 1191 violates due process because the inference permitted is irrational. The inference to which Gonzales refers is that testimony by the victim of uncharged sexual offenses corroborates the victim's testimony of the charged sexual offenses.

"But there is nothing irrational about a victim supporting her testimony with testimony of uncharged sexual offenses. We agree, however, that such testimony is not as probative as similar testimony from a third party. But it is still probative. [Citations.]" (*People v. Gonzales, supra,* 16 Cal.App.5th at pp. 501-502.)

In making this argument in his opening brief, defendant did not cite *Gonzales* (even though he did cite it elsewhere in the same brief). The People, of course, not only cited but also relied on *Gonzales*. Nevertheless, in his reply brief, defendant does not suggest any reason why we should not follow *Gonzales* on this point. Accordingly, we do follow it.

Even assuming *Stanley* and *Scott* are still good law, however, we reject defendant's argument for a separate and alternative reason. Even before the enactment of Evidence Code section 1108, this court held in *People v. Rios* (1992) 9 Cal.App.4th 692 that: "[I]n cases in which uncharged prior sexual offenses are offered to show the defendant's lewd disposition toward the prosecuting witness, . . . when the evidence of the *charged* offense consists of the prosecuting witness's testimony *plus* some corroborating evidence, there need not be separate corroborating evidence for each uncharged sexual offense committed against the prosecuting witness before that witness's testimony may be admitted as to such uncharged offense or offenses, so long as the evidence of uncharged offenses 'adds something to the prosecution's case,' i.e., it is relevant, material, and noncumulative." (*Id*. at p. 709.)

Here, there was some corroborating evidence for the sexual offenses in Doe's bedroom. Defendant and Doe exchanged chat messages showing that his affection for her was not strictly avuncular. In addition, Doe's mother testified that she once saw defendant in bed with Doe, upon which he immediately "jumped up." The evidence of the sexual offense in the hotel also augmented the prosecution's case. First, it "showed

defendant's sexual interest in and disposition toward [Doe]." (*People v. Rios*, *supra*, 9 Cal.App.4th at p. 709.) Second, defendant wanted to go to the hotel because he thought Doe's mother had found out about their relationship; thus, this evidence tended to confirm Doe's mother's testimony that she had seen defendant lying in bed with Doe. Accordingly, the hotel incident was admissible under *Rios*.

C. *Misstatement of the Burden of Proof.*

Second, defendant contends that CALCRIM No. 1191A erroneously allowed the jury to use a charged act of sexual penetration as propensity evidence, as long as it was proven by a preponderance of the evidence.

1. *Legal background.*

"'[Evidence Code s]ection 1101[,] subdivision (a) "expressly prohibits the use of an uncharged offense if the *only* theory of relevance is that the accused has a propensity (or disposition) to commit the crime charged and that this propensity is circumstantial proof that the accused behaved accordingly on the occasion of the charged offense."' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 588.)

By contrast, under "Evidence Code section 1101, subdivision (b), . . . uncharged conduct can be relevant and admissible to prove some fact other than propensity, such as motive or intent. [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1096.) When an uncharged offense is offered for this purpose, it need only be proven by a preponderance of the evidence, and the jury may be so instructed. (*Id*. at p. 1106.)

Evidence Code section 1108, enacted in 1995 (Stats. 1995, ch. 439, § 2, p. 3429), created an exception to Evidence Code section 1101, subdivision (a). It provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

It has been held that, just as with an uncharged offense admitted under Evidence Code section 1101, subdivision (b), an uncharged offense admitted under Evidence Code section 1108 need only be proved by a preponderance of the evidence. (E.g., *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061.)

Evidence Code section 1109 creates a similar exception, applicable when the defendant is accused of an offense involving domestic violence, for evidence of the defendant's commission of other domestic violence. "Section 1108 . . . and section 1109 . . . are 'virtually identical,' and cases which have interpreted section 1108 have been relied upon to resolve similar issues involving section 1109. [Citations.]" (*People v. James* (2010) 191 Cal.App.4th 478, 482, fn. 2.)

In 2005, *People v. Quintanilla* (2005) 132 Cal.App.4th 572 held that a *charged* offense *cannot* be used as propensity evidence under Evidence Code section 1109. (*Quintanilla* at pp. 582-583.) It further held that, when the jury is instructed that it may consider a charged offense as propensity evidence, it is error to instruct that the charged offense need only be proven by a preponderance. (*Id.* at p. 583.) It explained: "Here the

trial court told the jury to consider charged offenses under the preponderance standard for purposes of drawing a propensity inference, while also weighing the same evidence under the reasonable doubt standard for purposes of deciding Quintanilla's guilt on each charge. Such mental gymnastics may or may not be beyond a jury's ability to perform, but we are confident they are not required by section 1109." (*Ibid*.)

In 2007, the United States Supreme Court vacated the judgment in *Quintanilla* and remanded the case for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. (*Quintanilla v. California* (2007) 549 U.S. 1191.) *Cunningham*, of course, dealt with whether California's procedure for imposing an upper term sentence violated the Confrontation Clause; it had nothing to do with propensity evidence. Thus, the vacation did not deprive *Quintanilla* of its precedential value regarding propensity evidence. (See *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 744, fn. 1 [published opinion, even though vacated by United States Supreme Court, "retains the ordinary precedential value of a published opinion of an intermediate appellate court and it remains the law of the case on all points other than the federal constitutional issue"]; *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 848, fn. 1; see, e.g., *People v. O'Malley* (2016) 62 Cal.4th 944, 1014 [citing case "vacated on other grounds" by United States Supreme Court].)

In *People v. Villatoro* (2012) 54 Cal.4th 1152, however, the Supreme Court held, contrary to *Quintanilla*, that a charged offense *can* be used as propensity evidence under Evidence Code section 1108. (*Villatoro, supra,* at pp. 1160-1167.)

There, the defendant was charged with multiple rapes and sodomy. (*People v. Villatoro, supra,* 54 Cal.4th at p. 1167; see also *id.* at pp. 1156-1158.) The trial court gave a modified version of former CALCRIM No. 1191, which stated: "If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that decision also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge." (*Id.* at p. 1167.)

The Supreme Court held that, under Evidence Code section 1108, a charged offense can be used as propensity evidence to prove another charged offense. (*People v. Villatoro, supra,* 54 Cal.4th at pp. 1160-1167.) Accordingly, it disapproved *Quintanilla*, but only "to the extent it is inconsistent with the views expressed in this opinion." (*Villatoro,* at p. 1163, fn. 5.)

The court also rejected the defendant's argument that the instruction erroneously failed to specify what standard of proof applies to a charged offense when used as propensity evidence. (*People v. Villatoro, supra,* 54 Cal.4th at pp. 1167-1168.) It stated:

"[T]he modified instruction did not provide that the charged offenses used to prove propensity must be proven by a preponderance of the evidence. Instead, the instruction clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity. Thus, there was no risk the jury would apply an impermissibly low standard of proof. (Cf. *Quintanilla* . . . .)" (*Ibid*.)

Finally, in *People v. Cruz*, *supra*, 2 Cal.App.5th 1178, the court held, in reliance on *Villatoro*, that a charged offense must be proven beyond a reasonable doubt before it can be used as propensity evidence; thus, an instruction that it need only be proved by a preponderance of the evidence is erroneous. (*Id*. at pp. 1184-1187.)

It explained: "*Villatoro* did not expressly hold that currently charged offenses must be proved beyond a reasonable doubt before they can be used to show a propensity under Evidence Code section 1108, but it strongly implied that rule. It relied on an instruction requiring such proof to refute the defendant's argument that there was a risk the jury applied an impermissibly low standard. [Citation.]" (*People v. Cruz*, *supra*, 2 Cal.App.5th at p. 1186.)

The *Cruz* court added: "In effect, the instruction given here told the jury it should first consider whether the offenses charged . . . had been established by a preponderance of the evidence, while holding its ultimate decision on the same offenses in suspension. Then the jury was required to decide whether the preponderance finding showed a propensity, and whether this propensity, in combination with the other evidence, proved those offenses a second time, this time beyond a reasonable doubt. [¶] . . . [¶]

" . . . A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. A very fastidious lawyer or judge might even be able to do it. But it is not reasonable to expect it of lay jurors. We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt." (*People v. Cruz*, *supra*, 2 Cal.App.5th at pp. 1185-1186.)

Last but not least, *Cruz* held that, because the error "ha[d] the effect of lowering the reasonable-doubt standard for guilt," it was "'structural' and therefore reversible per se." (*People v. Cruz*, *supra*, 2 Cal.App.5th at p. 1187.)[4]

In March 2017, in the wake of *Villatoro* and *Cruz*, the CALCRIM Committee broke up former CALCRIM No. 1191 into two new versions. CALCRIM No. 1191A applies to *uncharged* sex offenses that are used as propensity evidence; it provides that such offenses must be proven by a preponderance of the evidence. CALCRIM No.

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[4] While this appeal was pending, *People v. Jones* (2018) 28 Cal.App.5th 316 held that an instruction allowing the jury to use the charged crimes as evidence of intent or identity under Evidence Code section 1101, subdivision (b), as long as they were proven by a preponderance, was "unnecessary" and "confusing." (*Jones* at pp. 330-331.) It further held, however, that the error was not structural; rather, it was subject to harmless error analysis. (*Id*. at pp. 328-329, 331-334; but see *id*. at pp. 337-338 [dis. opn. of Kline, J.].) It distinguished *Cruz* on the ground that *Cruz* dealt with Evidence Code section 1108. (*Jones* at p. 329.) Thus, *Jones* does not call into question *Cruz*'s holding that, in cases involving Evidence Code section 1108, an otherwise identical error is structural.

1191B applies to *charged* sex offenses that are used as propensity evidence; it provides that such offenses must be proven beyond a reasonable doubt.

2. *Application to these facts*.

In addition to the sexual penetration in the bedroom that was the original basis for count 2, Doe testified to an additional incident of sexual penetration in the hotel. The prosecutor told the jurors that they could find defendant guilty on count 2 based on either incident. The unanimity instruction stated: "The People presented evidence of more than one act to prove that the defendant committed [statutory rape and unlawful sexual penetration]." Defense counsel did not object, based on unfair surprise or any other ground. As a result, the hotel room incident became a *charged* sexual offense.

Under *Quintanilla* — which, as discussed, remains good law on this point — it is error to instruct that a charged offense, when used as propensity evidence, need only be proven by a preponderance. In case there is any doubt about the precedential status of *Quintanilla*, *Cruz* is authority for the same principle.

"In assessing a claim of instructional error, . . . [t]he test we apply is whether there is a *reasonable likelihood* the jurors would have understood the instructions in a manner that violated a defendant's rights. [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, italics added, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Admittedly, CALCRIM No. 1191A, as given in this case, referred to evidence of an "*uncharged* offense." (Italics added.) It could be argued that the jurors would not

necessarily have understood it to refer to evidence of the hotel room incident; conceivably they *could* have reasoned that there was no evidence of *any* uncharged offense, and therefore the instruction simply did not apply.

One crucial fact rebuts this argument. As part of CALCRIM No. 1191A, the trial court told the jury, "The People presented evidence that the defendant committed the crime of sexual penetration of [Doe] that was not charged in this case." The evidence showed only two acts of sexual penetration — one in Doe's bedroom and one in the hotel room. If the jurors followed the instruction (as we must presume they did), they necessarily concluded that one or the other of these was the "uncharged offense" that they could use as propensity evidence if it was proven by a preponderance. Thus, there is at least a reasonable likelihood that the jurors understood CALCRIM No. 1191A to apply to their consideration of the hotel room incident.[5]

The People argue that the instruction in this case is significantly different from the instruction in *Cruz*. In *Cruz*, the instruction said that, from evidence of another sexual offense, the jury could "' . . . infer that [the defendant] was likely to commit *and did commit* the crime or crimes of which he is accused.'" (*People v. Cruz*, *supra*, 2 Cal.App.5th at p. 1184, italics added.) By contrast, the instruction here merely said that,

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[5] The parties' opening statements have not been reported. However, they must have indicated that count 2 was based on the sexual penetration in the bedroom; they could hardly have said that count 2 was based on the hotel room incident, which Doe had not yet disclosed. This would have further indicated to the jury that the "uncharged offense" referred to the incident in the hotel room.

from evidence of another sexual offense, the jury could "conclude that the defendant was likely to commit" the charged sexual offenses.

This is a distinction without a difference. How was the fact that defendant was *likely* to commit the charged offenses relevant, except as a step toward the conclusion that he *did* commit them?

In this context, the People cite *People v. James* (2000) 81 Cal.App.4th 1343. *James* dealt with a now-superseded version of the standard instruction regarding the jury's consideration of evidence of other domestic violence offenses admitted under Evidence Code section 1109. (*James*, *supra*, at pp. 1349-1350.) It held that language allowing the jury to infer that the defendant "did commit" the charged domestic violence offense was erroneous, because it suggested that "propensity was sufficient to establish the elements of the charged offense beyond a reasonable doubt, regardless of the strength or weakness of the other evidence." (*Id*. at p. 1354.)

James was overruled sub silentio in *People v. Reliford* (2003) 29 Cal.4th 1007, which upheld an instruction using the "and did commit" language. (*Id*. at p. 1013.) But more important, *James* is simply beside the point. *Cruz* did not cite *James*; it did not hold that the instruction there was erroneous because it included the words "did commit." Rather, it held that the instruction was erroneous because it stated the wrong burden of proof. The same error would have existed even without the "did commit" language. And the same error exists here.

Finally, under *Cruz*, the error was structural. Accordingly, we must reverse defendant's conviction on count 2 without regard to whether the error was prejudicial.

We cannot see any way in which this error infected the verdict on count 1. The jury was instructed that count 1 had to be proven beyond a reasonable doubt. It was also instructed, in CALCRIM No. 1191A, that, if an "uncharged" act of sexual penetration was proven by a preponderance, it could consider that in determining whether defendant committed the act of sexual intercourse charged in count 1. Even if the jury took this to refer to the hotel room incident, this was a correct statement of the law under *Villatoro*. It was not instructed that it could consider the act of sexual intercourse as propensity evidence at all. Accordingly, defendant's conviction on count 1 may stand.

III

SEX OFFENDER FINE

Defendant contends that the trial court erred by imposing a sex offender fine on count 1. The People concede the error.

The trial court ordered defendant to pay a sex offender fine of $800. (Pen. Code, § 290.3.) Under Penal Code section 290.3, subdivision (a), whenever a person is convicted of a specified sexual offense, the trial court must impose "a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction . . . ." Clearly, the trial court imposed a fine on both count 1 and count 2.

The crime charged in count 2 — sexual penetration of a minor (Pen. Code, § 289, subd. (h)) — is one of the specified crimes; however, the crime charged in count 1 — statutory rape of a minor more than three years younger than the perpetrator (Pen. Code, § 261.5, subd. (c)) — is not. (Pen. Code, §§ 290, subd. (c), 290.3, subd. (a).) Thus, the fine on count 1 was statutorily unauthorized. And precisely because it was unauthorized, defendant can challenge it on appeal, even though he never objected to it below. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

IV

DISPOSITION

The judgment with respect to the conviction on count 1 is affirmed. The judgment with respect to the conviction on count 2 and with respect to the sentence is reversed.

The People may retry defendant on count 2. If, however, they elect, in a writing filed in the trial court, not to retry defendant, or if they fail to bring him to a new trial within the applicable time limit (see Pen. Code, § 1382, subd. (a)(2)), our remittitur shall be deemed to modify the verdict by striking the conviction on count 2, and the trial court shall promptly resentence defendant in accordance with the views expressed in part III of this opinion. (See *People v. Jones* (1997) 58 Cal.App.4th 693, 720, and cases cited.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

I concur:

McKINSTER
J.

[*People v. George Anderson*—E069057]

RAPHAEL, J., Concurring and Dissenting.

The jury instruction at issue in this appeal was legally correct, yet inapplicable to the facts of the case. The majority opinion errs by treating such an error as structural, exempt from harmless error analysis.

The error was in fact harmless. The instruction, CALCRIM No. 1191A, applied only to certain uncharged conduct, but there was no such conduct presented at trial. It was unlikely that the jury even used it. The majority's view that the jury nevertheless may have relied on that instruction to erroneously convict defendant George Anderson of sexual penetration of a minor requires that the jurors viewed one of his criminal acts in a logically impossible manner—simultaneously both uncharged conduct (in applying the instruction) and charged conduct (in then convicting). No reasonable juror would have applied the jury instructions in such an incoherent manner. I would thus affirm not only defendant's conviction on count 1 (as the majority does), but also his conviction on count two. As to the majority's reversal of count 2, I dissent.

I

To understand defendant's challenge to count 2, it is critical to understand the error that is alleged, which I will call "*Cruz* error" after *People v. Cruz* (2016) 2 Cal.App.5th 1178 (*Cruz*). *Cruz* error occurs in a situation where the prosecution's burden of proof beyond a reasonable doubt has been diluted. That dilution happens when the jury initially is asked, for evidentiary purposes, to find by a preponderance of the

evidence that a defendant has committed an act, but then later proceeds to decide beyond a reasonable doubt that he is guilty of a crime based on that very same act. *Cruz* error is founded on the human difficulty with faithfully applying a stringent standard after already applying a looser one to the same evidence. In the words of *Cruz*, the error occurs when instructions "present[] the jury with a nearly impossible task of juggling competing standards of proof during different phases of its consideration of the same evidence." (*Cruz*, *supra*, at p. 1187.)

The situation could occur due to a few evidentiary requirements, including Evidence Code section 1108. Section 1108 permits the prosecution to use other crimes as propensity evidence to prove a charged crime. Thus, for instance, if a defendant is charged with a particular rape that occurred in 2018, the prosecution may be able to admit evidence that he committed a similar rape in 2017 and ask the jury to consider the earlier crime as evidence of his propensity to commit the charged offense. Importantly, the jury may find that the earlier rape occurred by a preponderance of the evidence, even though the jury will be told that, in order to convict, it must find the defendant guilty of the 2018 rape beyond a reasonable doubt. CALCRIM No. 1191A, the instruction at issue in this appeal, accurately reflects this law. In the situation where CALCRIM No. 1191A applies to an uncharged crime, there is no *Cruz* error because the jury has been asked to find the charged crime only beyond a reasonable doubt.

In *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), our Supreme Court held that the prosecution may use even a *charged* offense as propensity evidence to prove

another charged offense. Thus, in *Villatoro*, the defendant was charged with five different rapes, and the Supreme Court affirmed the use of each one as evidence that the defendant had the propensity to commit the other. A saving feature of the jury instructions in *Villatoro*, however, was that they required the jury to find each charged offense beyond a reasonable doubt, even when the crime was used as propensity evidence. (*Villatoro, supra*, 54 Cal.4th at pp. 1167-1168 [noting the risk of "'mental gymnastics'" of having a jury apply two different standards to the same evidence].)

Cruz followed *Villatoro* with instructions that lacked that saving feature. In *Cruz*, the instructions told the jury that "the preponderance [of the evidence] standard applied to the determination of whether Cruz committed charged and uncharged offenses for the purpose of deciding whether he had a propensity to commit sexual offenses." (*Cruz, supra*, 2 Cal.App.5th at p. 1185.). *Cruz* held this was error, because a lay jury cannot be expected to find charged acts true by a preponderance of the evidence, and then proceed to determine if they have been proven beyond a reasonable doubt. (*Id.* at pp. 1185-1186 [noting that a "robot or a computer program" might be capable of finding an act by a preponderance of the evidence and later beyond a reasonable doubt, but it "is not reasonable to expect [this] of lay jurors."].) *Cruz* thus reversed a conviction. Following *Cruz*, the Judicial Council developed new model instructions to prevent *Cruz* error from occurring elsewhere. CALCRIM No. 1192B (not used in this case) is to be applied when the "other crime" used as propensity evidence is a charged crime, and it requires that crime to be proved beyond a reasonable doubt even when used for propensity purposes.

This case certainly does not present straightforward *Cruz* error. No instruction directed the jury to find a charged act by a preponderance of the evidence. Rather, the law provided to the jury in CALCRIM No. 1191A was entirely correct in stating that an *uncharged* crime is proved by a preponderance of the evidence to serve as propensity evidence. The error here was that this instruction simply did not belong in this case. There was no *uncharged* conduct as the instruction defined it. Where I differ with the majority is as to whether the erroneous inclusion of this irrelevant instruction prompted *Cruz* error. As I will explain, it did not, because the instructions did not lead to a conviction where the jury applied "competing standards of proof during different phases of its consideration of the same evidence." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1187.)

II

As the majority states, count 2 in this case was based on two charged sexual penetrations of the victim, either of which could serve as the basis for a conviction if the jury unanimously found beyond a reasonable doubt that the act occurred. The victim testified that one act occurred in her bedroom, the other in a hotel. The majority concludes that the jury may have treated the hotel act as uncharged conduct under CALCRIM No. 1191A, leading to *Cruz* error. (Maj. opn., *ante*, at pp. 20-22.)

The simple reason why this is incorrect is that *if* the jury treated the hotel act as *uncharged* conduct, that would mean it did not treat it as the act that formed the basis for the conviction and thus was required to be found beyond a reasonable doubt. More specifically, for *Cruz* error to have occurred under the majority's theory, the jury would

have to have engaged in a tortured and illogical chain of reasoning. Such error would occur only if the jury (a) determined that it would treat the hotel act as *uncharged* conduct though it was argued as charged conduct; (b) applied CALCRIM No. 1191A to find by a preponderance of the evidence that Anderson committed the hotel act; (c) considered the hotel act as proof of propensity to commit the remaining charged act, that is, the bedroom act; (d) decided that the proof of the bedroom act failed, so the defendant was *not* guilty of that act; and (e) proceeded to consider the hotel act as a *charged* act, finding Anderson guilty beyond a reasonable doubt of committing that act.

If the jury in fact engaged in the above reasoning, the conviction would be tainted as in *Cruz*, because the jury would have found the very act supporting conviction—the hotel act—by a preponderance of the evidence before finding it beyond a reasonable doubt. On the facts of this case, however, there is no reasonable possibility that the instruction led the jury to this reasoning.

First, as the majority recognizes, the jury was essentially told that both the bedroom and hotel acts were charged acts. (Maj. opn., *ante*, at p. 20.) That is, the Information charging count 2 did not charge any particular act but instead charged an unstated number of acts occurring over several weeks. The victim then testified that both the bedroom act and the hotel act occurred. The jury was given a unanimity instruction stating that the prosecution had "presented evidence of more than one act" to prove count 2, and told that it would have to be unanimous in finding that defendant committed a particular act. Finally, in closing argument, the prosecutor argued for guilt based on both

the hotel and bedroom acts.[1] In their arguments, neither party suggested that any conduct was uncharged, and neither party mentioned instruction 1191A. The jury was thus told that both acts were charged, and the arguments guided it to consider both acts as only charged conduct.

The majority's view that the jury may have treated the hotel act as uncharged results from the fact that trial was the first time the victim testified to it. Perhaps in an abstract sense, it was at one time "uncharged" in that the act was not in the mind of the prosecutor who charged the several weeks of unspecified acts alleged in count 2. But I cannot see how that abstraction would be seized upon by a lay jury in light of the actual testimony in the case, the instructions described above, the closing arguments treating both acts as charged, and the lack of any argument that the hotel act was uncharged.

The majority hinges its view on the "crucial fact" that instruction 1191A informed the jury that "'[t]he People presented evidence that the defendant committed the crime of sexual penetration of [Doe] that was not charged in this case.'" (Maj. opn., *ante*, at p. 21.) If the jurors followed this instruction, the majority believes, they "necessarily concluded" that one of the two charged acts was uncharged conduct. (*Ibid.*). This is not the case. The instructions allowed the (correct) conclusion that instruction 1191A was entirely irrelevant. The People presented the victim's testimony as to other sexual conduct by Anderson that fell short of "penetrations," and the jury could have properly

[1] The prosecutor argued: "Count 2 is sexual penetration. . . . She told us it happened a couple of times. She told us about the time in the hotel. She also told us about sometimes in their bedroom."

considered this other conduct and concluded that the instruction did not apply. Instruction 1191A warned the jury: "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense." Further, if the people have not so proved, "you must disregard this evidence entirely." In a separate instruction, the jury was told by the court that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts." In other words, when the jurors considered instruction 1191A, they were authorized to reach the conclusion that any effort by the prosecution to present uncharged acts of sexual penetration failed, a conclusion that seems particularly likely since the prosecution did not argue in closing about any uncharged acts. Thus, they were authorized to disregard the instruction. Given that the instruction was erroneously included, this was, in fact, the legally correct way for the jurors to treat the instruction.[2]

Even if the jurors for some reason considered the hotel act as uncharged conduct under instruction 1191A, the steps to *Cruz* error get even more improbable from there. The jurors would next have to have found by a preponderance of the evidence that the victim was credible in her testimony about the hotel act, so Anderson committed it.

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[2] The majority speculates that the jury may have been told in opening statement about the bedroom act but not the hotel act, and that this may have led it to treat the latter as uncharged conduct. (Maj. opn., *ante*, at p. 21, fn. 5.) It is also possible that the opening statements simply reflected the charge by telling the jury about a period of several weeks of sexual conduct that involved penetrations, rather than about a single specific act. Our record does not tell us. In any event, the majority recognizes that the instructions actually informed the jury that the hotel act was charged. (Maj. opn., *ante,* at p. 20.)

Following the instruction, they then would proceed to use the hotel act as propensity evidence to consider whether, beyond a reasonable doubt, the bedroom act occurred. If they *did* find that the bedroom act occurred, they would find Anderson guilty of count 2 without any *Cruz* error. This would be the very reasoning for which instruction 1191A is designed, and which the majority accepts in rejecting defendant's first argument: the use of uncharged conduct as propensity evidence to prove charged conduct under Evidence Code 1108 (Maj. opn., *ante*, at pp. 11-14). That is, if the jury *did* somehow consider the hotel act as uncharged conduct and used it to prove a different act beyond a reasonable doubt, that is not *Cruz* error, which requires the jury to "juggl[e] competing standards of proof during different phases of its consideration *of the same evidence*." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1187, italics added.)[3]

Consequently, the next step on the way to *Cruz* error would have to be that the jury found that, for some reason, Anderson was *not* guilty of the bedroom act, even considering the hotel act as propensity evidence. This is extremely unlikely on the actual facts of this trial, since Anderson's all-or-nothing defense was that the victim was not

[3] The majority must agree that *Cruz* error is so limited, as in the first issue decided in today's opinion, the majority follows *People v. Gonzales* (2017) 16 Cal.App.5th 494, in holding that a jury can be provided the differing Evidence Code section 1108 proof standards for uncharged and charged acts even when the testimony as to each comes from the same victim. (Maj. opn., *ante*, at pp. 11-14; compare *Gonzales*, *supra*, at pp. 505-507 [conc. of Perren, J.] [arguing that a beyond a reasonable doubt instruction is required for uncharged offenses where victim credibility is an issue in common with charged offenses].)

credible in her testimony about his charged sexual acts.[4] And if the jury somehow had doubts about only one of the two charged acts, one would think those doubts would be about the hotel incident disclosed for the first time at trial and not the bedroom incident. The path to *Cruz* error continues to get more unlikely.

At the final point in the necessary chain of jury logic, however, we should certainly conclude that no *Cruz* error occurred. The final step would be for the jury to decide that it would, after all, treat the hotel act as *charged* conduct, and convict on that conduct beyond a reasonable doubt. This would be *Cruz* error. But it would occur only after the jury had determined to treat the hotel act as *uncharged* conduct under instruction 1191A and then followed that instruction to consider that uncharged conduct as evidence that the charged act, the bedroom act, occurred. Rather than accept this, we should conclude that the error of including instruction 1191A was harmless because no reasonable juror would be led to *Cruz* error by its inclusion, as such error resulted only if the instruction was applied in an unlikely, illogical, and internally inconsistent manner.

III

The majority opinion's answer to the above harmlessness analysis is that it does not matter whether the erroneous inclusion of instruction 1191A was harmful. Instead, the majority finds that the error here was structural and not subject to harmlessness analysis. In my view, this is wrong.

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[4] Defense counsel argued in closing: "She's either lying or she's not. Those are the only two options here that are reasonable." Later, defense counsel argued, "if you believe that she's telling the truth about what allegedly took place, then your decision is easy."

"[A]n instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal.'" [Citation.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67). "Such error does not implicate the defendant's constitutional rights and is subject to harmless error review under *People v. Watson* [(1956) 46 Cal.2d 818, 816]." (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247.)

To be sure, *Cruz* found structural error in reversing a conviction. But this was based on a legally incorrect instruction, not a correct (but inapplicable) one. And *Cruz* found error structural only after determining that the erroneous instruction combined the preponderance and beyond a reasonable doubt standards offenses and thus "produced a hopeless muddle." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1186.) *Cruz* concluded that "the ultimate effect [of the instructions] is to lower the prosecution's burden of proving guilt beyond a reasonable doubt." (*Id.* at p. 1187.) *Cruz* then stated that "[c]onsequently" it found the error "reversible per se" and not subject to harmless error. (*Ibid.*)

Thus, under *Cruz*, *if* a jury instruction lowers the prosecution's burden of proof, then a guilty verdict must be reversed due to structural error. But we must first find that the burden has been lowered. It is not the case that any instructional error is structural just because the error, considered in the abstract, could affect the burden of proof. (See *People v. Aranda* (2012) 55 Cal.4th 342, 363-367 [omission of instruction defining reasonable doubt is error, but is reviewed for harmlessness]; *Rose v. Clark* (1986) 478

U.S. 570, 580 [harmless error analysis applies to an erroneous instruction creating a rebuttable presumption that impermissibly lightens the prosecution's burden of proof on an element].) The majority finds that because (in its view) Instruction 1191A might actually have been relied upon by the jury, the error is structural. But the majority does not attempt to tie that reliance to the instruction's actually lowering the prosecution's burden by having the jury "juggl[e] competing standards of proof during different phases of its consideration of the same evidence." (*Cruz*, *supra*, 2 Cal.App.5th at p. 1187).

As to whether harmless error review applies here, *People v. Jones* (2018) 28 Cal.App.5th 316 (*Jones*) is instructive. *Jones* reviewed for harmlessness even an instruction that informed a jury it could consider charged thefts by a preponderance of the evidence and use those findings to determine identity and intent to commit other charged thefts. (*Id.* at p. 319.) Unlike *Cruz*, *Jones* held that the particular instructions "did not have the practical effect of lowering the standard of proof." (*Jones*, *supra*, at p. 330.) Our case is a far more clear case for harmlessness review than *Jones*, because we had no instruction erroneously directing the jury to consider charged offenses by a preponderance of the evidence.[5] Where, as here, an instruction is legally correct but

[5] The majority distinguishes *Jones* because it did not involve Evidence Code section 1108; that is, because it dealt with evidence of identity and intent rather than propensity evidence. (Maj. opn., *ante*, at p. 19, fn. 4.) In my view, this misses the point. *Cruz* error occurs when the burden of proof beyond a reasonable doubt is diluted because a jury is first required to review by a preponderance of the evidence the very act on which it proceeds to convict. The reason *why* the jury is instructed to engage in the initial preponderance review need not be dispositive. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1181 [structural error where instruction "had the effect of lowering the prosecution's burden of proof" by authorizing an initial preponderance finding about

irrelevant—so the jury instructions are valid on their face—we certainly must consider the practical effect of the inapplicable instruction rather than find structural error without doing so.

If the majority could explain how the superfluous CALCRIM No. 1191A instruction had "the practical effect of lowering the standard of proof" in this case (*Jones, supra,* 28 Cal.App.5th at p. 330), reversal for structural error would be warranted. But I think this cannot be shown, because the inapplicable instruction 1191A did not actually lower the prosecution's burden of proof by having the same evidence considered under competing standards of proof. In today's opinion, the majority wrongly takes the formal error of providing a legally correct but inapplicable instruction and declares it structural, without explaining how that instruction actually lowered the burden of proof.[6]

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offense conduct, not involving Evidence Code section 1108].) In my view, *Cruz* and *Jones* are properly reconciled by their principle that an appellate court applies harmlessness review to instructional error unless it is persuaded that the instructions have, as a practical matter, lowered the prosecution's required burden. (Compare *Cruz, supra,* 2 Cal.App.5th at p. 1186 ["for practical purposes, the instruction lowered the standard of proof for the determination of guilt"] with *Jones, supra,* 28 Cal.App.5th at p. 330 [instruction "did not have the practical effect of lowering the standard of proof"].) One may disagree with the application of that principle to the facts of either case, but this principle unifies the two cases, and it is consistent with our Supreme Court's approach in *People v. Aranda, supra,* 55 Cal.4th at pages 363-367, and United States Supreme Court law, see *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60 ["In a series of post-*Chapman* [*v. California* (1967) 386 U.S. 18] cases . . . we concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review."].

[6] The majority actually applies a harmless error analysis in determining that it "cannot see any way in which this error infected the verdict on count 1." (Maj. opn., *ante,* at 23.) This may reveal that the error is not structural, as such errors "are not 'simply an error in the trial process,' but rather an error 'affecting the framework within which the trial proceeds.'" (*Aranda, supra,* 55 Cal.4th at pp. 363-364 [citing statement in

I thus join the opinion in affirming the conviction on count 1, but dissent from the reversal of count 2.

RAPHAEL

J.

Brecht v. Abrahamson (1993) 507 U.S. 619, 630 that structural errors require automatic reversal because "'they infect the entire trial process'"].)